

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
MINORITY TELEVISION PROJECT, INC.)	
)	File Nos. EB-00-IH-0153
Licensee of Noncommercial Educational)	and EB-01-IH-0652
Television Station KMTP-TV,)	NAL/Acct. No. 200232080020
San Francisco, California)	Facility ID No. 43095
)	FRN No. 0005704366

ORDER ON REVIEW

Adopted: December 21, 2004

Released: December 23, 2004

By the Commission:

1. In this *Order on Review*, we deny an Application for Review filed by Minority Television Project, Inc. ("Minority"), pursuant to section 1.115 of the Commission's rules.¹ Minority seeks review of a Forfeiture Order² in which the Enforcement Bureau (the "Bureau") imposed against Minority a forfeiture of \$10,000 for its willful and repeated broadcast of advertisements over noncommercial educational Station KMTP-TV, San Francisco, California, in violation of section 399B of the Communications Act of 1934, as amended (the "Act"),³ and section 73.621(e) of the Commission's rules.⁴ In so acting, the Bureau also dismissed, as moot, Minority's related June 13, 2000, Request for Declaratory Ruling.

2. In its Application for Review, Minority reiterates past arguments raised at the Bureau level. We find that these arguments were fully and correctly addressed in the Bureau's Order except to the extent that we take the opportunity to elaborate here on certain issues. Minority reiterates its past argument that the Commission cannot sanction it for the underwriting announcements at issue due to constitutional and statutory provisions protecting the rights of foreign-language speakers and viewers. It also again contends that section 399B of the Act, as well as the Commission's rules and policies promulgated thereunder, constitute unconstitutional restrictions on commercial speech.⁵ We reject these

¹ 47 C.F.R. § 1.115.

² See *Minority Television Project, Inc. (KMTP-TV)*, Forfeiture Order, 18 FCC Rcd 26611 (Enf. Bur. 2003) ("*Forfeiture Order*").

³ 47 U.S.C. § 399b.

⁴ 47 C.F.R. § 73.621(e).

⁵ In support, Minority cites several cases regarding the limits placed on government, in varied contexts, when it attempts to abridge free speech. See *U.S. v. O'Brien*, 391 U.S. 367 (1968); *Yniguez v. Arizona*, 69 F.3d 920, 941 (9th Cir. 1995) (en banc) (reversed and remanded on other grounds); *Arizonians for Official English v. Arizona*, (continued....)

arguments. The current statutory scheme, rules and policies governing noncommercial educational broadcasters have been in place for more than twenty years.⁶ The Bureau fully considered language-specific issues in reaching its findings in this proceeding.⁷ Furthermore, we reject Minority's argument that the noncommercial underwriting statute, rules and policy imposes an English-only standard or discriminates against non-English speakers or specific ideas in violation of the First Amendment or the equal protection guarantee of the Due Process Clause of the Fifth Amendment. To the contrary, neither section 399B of the Act nor section 73.621(c) of the Commission's rules prohibit the use of a foreign language or discriminate against foreign language programming under the regulatory scheme.⁸ Accordingly, we see no constitutional infirmity in the regulatory scheme. Minority also again asks the Commission to revisit its underwriting announcement standards and to adopt ones that are "capable of meaningful prospective use." We agree with the Bureau's rejection of this request, for the reasons explained in the Bureau's *Forfeiture Order*.⁹ The standards are already clear.

3. We also reject Minority's claim here that the Bureau relied on an inadequate translation of the broadcast material in question. Our review of the record confirms that the Bureau considered carefully the underwriting announcements at issue, but, consistent with applicable Commission precedent, rejected certain linguistic connotations Minority had urged that the Commission accept. We note, however, that, in evaluating the announcements, the Bureau also specifically deferred to the translations provided by Minority itself, except in those instances in which the licensee had failed to provide any.¹⁰ Finally, although Minority claims that its underwriting announcements were drafted in accordance with standards enunciated and observed by Public Broadcasting Service stations, that claim, even if true, offers no defense or basis for mitigation. The practices followed, or opinions rendered, by other broadcasters or

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517 U.S. 1102 (1996), on remand at 118 F.3d 667 (9th Cir. 1997), remanded with instructions to dismiss at 119 F.3d 795 (9th Cir. 1997); and *Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976).

⁶ See 47 U.S.C. § 399b, which was added by Public Law 97-3, 95 Stat. 357, 731, Aug. 13, 1981; 47 FR 36179, Aug. 19, 1982; and *Commission's Policy Concerning the Noncommercial Educational Nature of Educational Broadcasting Stations*, Memorandum Opinion and Order, 90 FCC 2d 895 (1982) ("*Policy Statement*"), *recon. granted in part*, 97 FCC 2d 255 (1984).

⁷ See *Forfeiture Order*, 18 FCC Rcd 26611, 26614 at ¶ 10, *citing Licensee Responsibility to Exercise Adequate Control Over Foreign Language Programs*, Memorandum Opinion and Order, 39 FCC 2d 1037 (1973).

⁸ Minority cites several cases regarding the limits placed on government in varied contexts when it attempts to abridge free speech. See n. 5, *supra*. We find these cases inapplicable to the facts at issue here because they do not address the statutory provision at issue and they interpret a purported government limitation on the use of foreign language, which is not the case here.

⁹ See *Forfeiture Order*, 18 FCC Rcd 26611, 26613 at ¶ 7.

¹⁰ See *id.*, 18 FCC Rcd 26611, 26615 at ¶ 12. As correctly noted by the Bureau in the *Forfeiture Order*, Minority failed to provide specific translations for the Met-Life, Scandinavian Furniture, Sincere Plumbing, and East West Bank announcements. *Id.* Instead, Minority commented on the translations provided by the complainant, which were found at Attachment P to Minority's March 25, 2002, response, and identified as Announcements 4, 5, 6 and 7. See *id.*, *citing NAL* at ¶¶ 23-25. We find that the Bureau properly evaluated Minority's comments, and correctly concluded that they did not alter the announcements' overall promotional nature, which was demonstrated by the announcements' linguistic and visual elements. See *Forfeiture Order*, 18 FCC Rcd 26611, 26615 at ¶ 12.

trade organizations are not binding on the Commission.¹¹ Rather, licensees should rely only on the official Commission sources and precedents themselves.¹²

4. Minority argues that the Bureau failed to accord proper weight to two additional mitigating factors. First, Minority argues that only the aggregate number of announcements in question, 18, and not the number of times that they were aired, 1,911, should be determinative in setting the forfeiture amount.¹³ Second, it argues that the continuing nature of the violation over the period 2000 through 2002 should be mitigated by the fact that the Bureau had not advised Minority of its obligations by ruling on its declaratory ruling request, which sought approval to air the announcements in question. Minority cites no authority or precedent for either of its contentions. We find that the Bureau properly rejected the first argument for the reasons stated in the *Forfeiture Order*, which are consistent with precedent.¹⁴ Both the number of announcements and the number of times they aired are relevant to the amount of the forfeiture, and these factors were properly considered by the Bureau.¹⁵ In any event, we agree with the *Forfeiture Order's* alternative holding that a \$10,000 forfeiture would hardly be excessive even if the number of cited announcements were fewer or if they had been run substantially fewer times.¹⁶ As to the second argument, we note that Commission precedent affords mitigation in circumstances where licensees rely to their detriment on official advice that later proves to have been erroneous or incomplete.¹⁷ However, having not received any specific Commission advice concerning the instant announcements in this case, it was incumbent on Minority, as it is upon all similarly situated noncommercial licensees, to consult pertinent Commission precedent and to make its own good-faith determinations as to the announcements' acceptability. Ambiguity is not created simply by the filing of a request for further guidance regarding a clear rule. For the reasons set forth above, we conclude that Minority ignored settled precedent and failed to properly exercise its good-faith discretion in broadcasting the underwriting announcements in question.¹⁸ Therefore, the fact that Minority had earlier requested, but had failed to receive, a declaratory ruling on the acceptability of the underwriting announcements, is not a mitigating factor under the circumstances of this case.

5. Upon review of the Application for Review and the entire record herein, we conclude

¹¹ See *Board of Education of New York (WNYE-TV)*, Letter of Caution, 7 FCC Rcd 6864 (MMB 1992).

¹² Cf. *Pine-Aire Broadcasting Corporation, Inc. (WRLS-FM)*, Memorandum Opinion and Order, 4 FCC Rcd 1553 (1989) (reliance on advice rendered by Commission officials may, in appropriate circumstances, constitute a mitigating factor to be considered in determining forfeiture amount).

¹³ Minority misstates the *Forfeiture Order's* holding. The Bureau cited only 17 announcements in setting the forfeiture amount at \$10,000. See *Forfeiture Order*, 18 FCC Rcd 26611, 26616-17 at ¶ 15.

¹⁴ See *id.*; 47 U.S.C. § 503(b)(2); note to 47 C.F.R. § 1.80(b)(4). Under section 503(b) of the Act, each prohibited broadcast is deemed to constitute a separate offense.

¹⁵ See *Forfeiture Order*, 18 FCC Rcd 26611, 26616-17 at ¶ 15, n.55.

¹⁶ *Id.*

¹⁷ See *Pine-Aire Broadcasting Corporation, Inc. (WRLS-FM)*, *supra*.

¹⁸ See *Xavier University*, Memorandum Opinion and Order, 5 FCC Rcd 4920 (1990) (the Commission defers to the "reasonable, good faith judgments" exercised by licensees and finds violations only where material is "clearly" promotional as opposed to merely identifying).

that Minority has failed to demonstrate that the Bureau erred. The Bureau properly decided the matters raised below, and we uphold its decision for the reasons stated in its *Forfeiture Order*.¹⁹

6. Accordingly, IT IS ORDERED, pursuant to section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), that the Application for Review filed by Minority Television Project, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁹ Minority further argues that the announcement made on behalf of State Farm could not be deemed to violate section 399B of the Act because consideration was not supplied by the sponsor to the broadcaster itself. First, we note that Minority cites no statutory language or case law supporting its assertion, and pertinent precedent has held precisely otherwise. *See Forfeiture Order*, 18 FCC Rcd 26611, 26616 at ¶ 13, *citing 1982 Policy Statement*, 90 FCC 2d at 911-12, ¶¶ 26-28. Moreover, Minority ignores that the Bureau found the circumstances surrounding Minority's broadcast of the State Farm announcement to be mitigating, and did not include that announcement in its determination of the forfeiture amount.